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In the Supreme Court of the United States

OCTOBER TERM, 1971

No.

JAY G. PHILPOTT, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL., PETITIONERS

v.

VINCENT R. HILL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the District Director of Internal Revenue and other federal officers, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (Appendix A, *infra*, pp. 1a–14a) are not yet reported. The opinion of the district court (Appendix C, *infra*, pp. 16a–24a) is reported *sub nom. United States* v. *Premises, 801 North Seventh Street*, at 310 F. Supp. 1316.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1971 (Appendix B, *infra*, p. 15a). A peti-

tion for rehearing was denied on July 29, 1971 (Appendix D, *infra,* p. 25a). On August 19, 1971, Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including September 27, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Fifth Amendment privilege against self-incrimination bars federal agents from seizing business records of an individual taxpayer pursuant to a search warrant based on affidavits showing probable cause to believe the taxpayer has wilfully evaded paying taxes.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment of the United States Constitution provides in relevant part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

Section 3103 of Title 18, United States Code, provides:

> § 3103. *Grounds for issuing search warrant—(Rule).*
>
> SEE FEDERAL RULES OF CRIMINAL PROCEDURE
>
> Grounds prescribed for issuance of search warrant, Rule 41(b).

Section 3103a of Title 18, United States Code, provides:

> § 3103a. *Additional grounds for issuing warrant.*
>
> In addition to the grounds for issuing a warrant in section 3103 of this title, a warrant may be issued to search for and seize any property that constitutes evidence of a criminal offense in violation of the laws of the United States * * *.

Rule 41(b) of the Federal Rules of Criminal Procedure provides in pertinent part:

> (b) *Grounds for issuance.* A warrant may be issued under this rule to search for and seize any property
>
> (1) Stolen or embezzled in violation of the laws of the United States; or
>
> (2) Designed or intended for use or which is or has been used as the means of committing a criminal offense;
>
> * * * * *

STATEMENT

Vincent R. Hill (the "taxpayer") is a licensed physician and surgeon who has been engaged in the

practice of medicine at Springfield, Illinois, for more than 20 years. On February 19, 1970, the United States District Court for the Southern District of Illinois issued two warrants authorizing the search of taxpayer's residence and office, respectively, and the seizure of "fiscal records relating to the income and expenses of Dr. Vincent R. Hill from his medical practice for the period January 1, 1963 to February 19, 1970 * * *" (App. C, *infra*, p. 21a). The warrants specifically enumerated the following items (App. C, *infra*, p. 22a):

> * * * control records and ledger cards compiled and kept by use of a Burroughs machine bookkeeping system; log books; or journals; copies of receipts covering payments of fees; appointment books; records of visitations of patients away from the medical office; patients folders and their contents; adding machine tapes; bank deposit slips, bank statements; cancelled checks; copies of federal income tax returns; and divers other records of financial transactions which are intended for use in violating the provisions of the Internal Revenue laws or regulations prescribed thereunder, or which have been so used * * *.

Authorization for the search and seizure was based on several affidavits by the taxpayer's former employees, "who had assisted Dr. Hill in his office practice and who, in various capacities and under the direction and supervision of Dr. Hill and his wife * * * made and kept various records, including the fiscal records with respect to Dr. Hill's patients" (App. C, *infra*, p. 17a). These affidavits stated that the taxpayer maintained a separate set of financial records, called "Red

Letter Folders," which related to certain patients;[1] that charges and payments for these patients were not processed through the Burroughs machine bookkeeping system, but were maintained differently; that the money received from "red letter" patients was placed each day in separate envelopes and given directly to the taxpayer;[2] that these amounts were never added to the totals of the Burroughs-processed receipts, nor were they entered directly into the loose-leaf or log-book record. See Appendix E, *infra*, pp. 26a–36a. One former employee stated that the taxpayer had given instructions "that if any tax man visited the office to make an investigation, one employee should occupy him in the receptionist's area and the other employee was to incinerate the 'red letter folders' contained in the office in the automatic incinerator" (App. A, *infra*, p. 2a). And an affidavit of a "red letter" patient showed that at least one or two cancelled checks given to the taxpayer for medical services rendered bore a second endorsement by Myers Brothers Department Store in Springfield (*ibid.*).

On this evidence, special agent Ranalletta stated in an affidavit that, based on more than 15 years' experience, he concluded that there was probable cause to believe that the taxpayer's actions and practices

[1] As stated in the affidavits (App. E, *infra*, p. 33a), "[p]atients whose files were to be categorized as red letter cases were sometimes drawn from non-insurance cases, patients who appeared infrequently, patients who paid at time of visits and patients who appeared for refills of prescriptions."

[2] It was stated that "[r]ed letter transactions occurred regularly" and that apparently "most office days included some of these transactions" (App. E, *infra*, p. 33a).

"were analogous with conduct such as: (1) keeping a double set of books, (2) making alterations, (3) concealing sources of income, and (4) destroying or proposing to destroy records in furtherance of concealment, and were designed to prevent or controvert discovery of the omissions" (App. A, *infra*, p. 3a).

Pursuant to the warrants, agents of the Internal Revenue Service searched the described premises and removed therefrom some thirty-five cartons of what the agents described as a "truckload of books, records and papers" (App. A, *infra*, p. 4a).

On the following day, February 20, 1970, the taxpayer petitioned the United States District Court for the Southern District of Illinois for the return of the seized records and for suppression of their use as evidence. He contended that the seizure invaded his right against self-incrimination and deprived him of property without due process of law, in violation of the Fifth Amendment, and that the records were seized under an overly broad search warrant, in violation of the Fourth Amendment.[3]

On March 30, 1970, the district court denied taxpayer's petition (App. C. *infra*, pp. 16a–24a), holding

[3] While some personal records were intermingled in the boxes containing petitioner's financial records that were taken from his house, the personal material was promptly identified and returned without copying. The financial records, however, have not been returned. At the outset of these proceedings the district court rejected the government's suggestion that it furnish taxpayer with photostatic copies of all seized records: it enjoined the government from photographing or in any way using the records, but ordered it to furnish the taxpayer with any copies he might request.

that the records were subject to seizure under Rule 41 (b), Fed. R. Crim. P., and 18 U.S.C. 3103a, respectively, as "the instrumentalities by which the crimes of willfully attempted tax evasion had been and were then being committed, as well as evidence of the crimes of willfully attempted tax evasion" (App. C, *infra*, p. 23a). The court further found that, as instrumentalities of a crime, the records were subject to forfeiture under Section 7302 of the Internal Revenue Code of 1954.[4] In rejecting the taxpayer's Fourth Amendment contention, it held that the description in the warrants of the items to be seized was sufficiently specific and "left nothing to the discretion of the officers executing the search warrants" (App. C, *infra*, p. 23a). It therefore followed, the court concluded, that the taxpayer's due process argument must also fail. The taxpayer appealed.[5]

A divided panel of the court of appeals, without reaching taxpayer's Fourth Amendment argument or addressing itself to the due process contention under the Fifth Amendment, reversed (App. A, *infra*, pp.

[4] Section 7302 provides in relevant part: "It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property. A search warrant may issue as provided in chapter 205 of title 18 of the United States Code and the Federal Rules of Criminal Procedure for the seizure of such property * * *."

[5] Since there was no criminal proceeding pending at the time the district court denied the taxpayer's petition, the judgment of the district court was appealable under *DiBella* v. *United States*, 369 U.S. 121, 131–132.

1a–13a). The majority held that the seizure of these fiscal records, even assuming that it was done pursuant to a valid warrant, violated the taxpayer's Fifth Amendment privilege against self-incrimination because the books and records are of a "testimonial" or "communicative" nature under *Schmerber* v. *California,* 384 U.S. 757. Judge Fairchild, dissenting (App. A, *infra,* pp. 13a–14a) , disputed this characterization, concluding that even if "there is a class of papers so intimately confidential and so much a part of personhood that they ought to enjoy a superlative privacy and be protected from seizure upon an adequately grounded warrant, it does not seem to me that the records in question here have the required character."

REASONS FOR GRANTING THE WRIT

1. The court below, in holding that the seizure of a taxpayer's business records pursuant to a valid search warrant violates the privilege against self-incrimination,[6] invokes in our view an overly broad

[6] The district court held that the search warrant here met the standards of particularity under the Fourth Amendment (App. C *infra,* p. 23a). While the court of appeals declined to reach that question, its analysis on Fifth Amendment grounds assumes *arguendo* that the ruling of the district court in this regard was correct. Thus, the question presented in this petition does not arise in the context of a broad paper-search under a general warrant, such as that in *Entick* v. *Carrington,* 19 Howell St. Tr. 1029, 1073, and the issue here is not whether a seizure of objects *in violation of the Fourth Amendment* amounts to an invasion of the taxpayer's constitutional privilege against self-incrimination. See *Goulea* v. *United States,* 255 U.S. 298, 311; compare *Mapp* v. *Ohio,* 367 U.S. 643, 661 (Black, J., concurring).

interpretation of the Fifth Amendment privilege which imposes undue restrictions on lawful activity of federal law-enforcement officials under the Fourth Amendment. The interrelationship of the Fourth Amendment and the self-incrimination clause of the Fifth Amendment is not entirely clear. Both this Court (*Warden* v. *Hayden*, 387 U.S. 294)and the Congress (18 U.S.C. 3103a) have expanded the scope of lawful searches and seizures beyond the traditional perimeters of instrumentalities, fruits of a crime or contraband. It is important that law-enforcement officers know when the exercise of their authority under these newly defined standards will infringe on other constitutional rights. That determination is one that properly should be made by this Court. We bring the issue here because a prompt resolution seems particularly desirable to apprise both taxpayers and agents of the Internal Revenue Service of the extent to which the latter may continue to seize financial records under lawful search warrants.[7]

2. The history and origin of the Fourth Amendment have been examined on too many occasions by this Court to warrant repetition here. See, *e.g.*, *War-*

[7] In another case in which the issue has been squarely presented, *VonderAhe* v. *Howland*, N.D., Cal. No. 70–1438, decided March 17, 1971, the district court rejected a similar Fifth Amendment contention and upheld the seizure of "private financial books, papers and records" of a dentist-taxpayer incident to a lawful search warrant. The case is presently pending on appeal in the Ninth Circuit (*VonderAhe* v. *Howland*, No. 71–1982). But see *United States* v. *Blank*, N.D. Ohio, Cr. No. 71–399 decided August 27, 1971, suppressing gambling records of the accused, seized pursuant to a lawful search warrant, on the basis of the Seventh Circuits decision in the present case.

den v. *Hayden, supra,* 387 U.S. at 301–303; *Stanford* v. *Texas,* 379 U.S. 476, 481–485; *Marcus* v. *Search Warrant,* 367 U.S. 717, 724–729; *Frank* v. *Maryland,* 359 U.S. 360; *Harris* v. *United States,* 331 U.S. 145, 157–161 (dissent); *Boyd* v. *United States,* 116 U.S. 616, 624–629. It is enough for present purposes to emphasize that the rights secured by that constitutional provision generally bear no relation to the nature of the property being sought. The Founders were concerned with two kinds of invasions of privacy—unreasonable warrantless searches and searches under an indiscriminate general authority. It was to protect "the sanctity of a man's home and the privacies of life" (*Boyd* v. *United States, supra,* 116 U.S. at 630) against unauthorized or overbroad invasions that the Amendment was adopted.

To insure that a man's home might not be unreasonably invaded at the whim of government officials, "the Fourth Amendment * * * interposed a magistrate between the citizen and the police * * * [and required the] magistrate to pass on the desires of the police before they violate the privacy of the home." *McDonald* v. *United States,* 335 U.S. 451, 455–456. And, to assure that "no official of the State shall ransack [a man's] home and seize his books and papers under the unbridled authority of a general warrant" (*Stanford* v. *Texas, supra,* 379 U.S. at 486), the draftsmen of the Bill of Rights authorized the issuance of only such search warrants as "particularly [describe] the place to be searched, and the person or things to be seized" (U.S. Const., Amend. IV).

But, within these constitutional safeguards, it now appears well-settled that law-enforcement officials generally need not, for purposes of the Fourth Amendment, concern themselves with the nature of the property to be seized pursuant to a lawful warrant. Earlier pronouncements by this Court suggesting a limitation on permissible seizures to items within the category of instrumentalities, fruits of a crime or contraband (see, *e.g., Gouled* v. *United States, supra,* 255 U.S. at 308–309; *United States* v. *Lefkowitz,* 285 U.S. 452, 465–466) have been explicitly repudiated in the recent decision of *Warden* v. *Hayden, supra,* 387 U.S. at 300–307. Objects of evidential value only are now subject to the power of search and seizure. The *Warden* case, however, involved items of clothing; and this Court, in holding that they were subject to seizure under the Fourth Amendment even though "mere evidence" (387 U.S. at 310), pointed out (387 U.S. at 302–303):

> The items of clothing involved in this case are not "testimonial" or "communicative" in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment. *Schmerber* v. *California,* 384 U.S. 757. This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.

3. In the present case, the items in question are the business records of a physician-taxpayer; they are admittedly of a nature that is more "testimonial" or "communicative" than the items of clothing involved

in *Warden*. Thus, an aspect of the issue left open by this Court in *Warden* is presented here.

Private papers of a distinctly personal nature may be entitled to a special protection from otherwise reasonable searches and seizures that need not be accorded to other objects of evidential value. *Boyd* v. *United States, supra,* 116 U.S. at 622, 630, 633 (dictum). But, whether that protection flows from the self-incrimination clause of the Fifth Amendment, or derives from the fact that the personal thoughts and opinions of an individual are so much a part of the "privacies of life" (*Boyd* v. *United States, supra,* 116 U.S. at 630) that the values underlying the Fourth Amendment are alone sufficient to afford diaries, personal letters, and the like, a special immunity (see *United States* v. *Bennett,* 409 F. 2d 888 (C.A. 2); *State* v. *Bisaccia,* 45 N.J. 504, 213 A. 2d 185)), or indeed is founded in the First Amendment (cf., *e.g., NAACP* v. *Alabama,* 357 U.S. 449), is a question we need not reach here. For the papers that were seized in this case are, we submit, of a distinctly different character. They contain nothing more than daily financial records of the taxpayer's business; not written words as such, but simply a running account of charges and payments relating to "red letter" patients. In *Stanford* v. *Texas, supra,* 379 U.S. at 485 n. 16, this Court, speaking in a related context, recognized that "[a] 'book' which is no more than a ledger of an unlawful enterprise * * * might stand on a quite different constitutional footing from the books * * * [that reflect thoughts, opinions, beliefs, or mere predilictions

of their possessors]."[8] See also *Marron* v. *United States*, 275 U.S. 192, 198–199. We agree with the dissenting judge below that such business ledgers or financial records are not "so intimately confidential and so much a part of personhood that they ought to enjoy a superlative privacy and be protected from seizure upon an adequately grounded warrant" (App. A, *infra*, p. 14a). See, *e.g.*, *People* v. *Thayer*, 63 Cal. 2d 635, 408 P. 2d 108, certiorari denied, 384 U.S. 908, where the California court (Traynor, C. J.) upheld the introduction into evidence of papers seized by lawful search warrant from a doctor who had engaged in falsely billing a state agency for services never rendered. And cf. *Mengarelli* v. *United States*, 426 F. 2d 985 (C.A. 9); *James* v. *United States*, 416 F. 2d 467 (C.A. 5).

4. The court below, in reaching the contrary conclusion, relies heavily on cases holding that "where the Internal Revenue Service has sought court enforcement of its summons pursuant to statute (26

[8] Books and private papers in the latter category may well come within that special area where the First Amendment right of free expression and the Fourth Amendment right of privacy seem to overlap. Cf. *Stanley* v. *Georgia*, 394 U.S. 557. As this Court stated in *Stanford* v. *Texas*, *supra*, 379 U.S. at 485, in this area "* * * the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain." And cf. *Entick* v. *Carrington*, *supra*, involving a general search for political tracts and letters in connection with a prosecution for seditious libel, which would conflict with First Amendment rights and thus be "unreasonable" under the Fourth Amendment.

U.S.C. § 7402), * * * a taxpayer may refuse production of personal books and records by assertion of his privilege against self-incrimination" (App. A, *infra*, p. 5a).[9] Those decisions, however, are not apposite in the present circumstances. Where the government proceeds by summons or subpoena, the taxpayer is necessarily required to testify against himself as a witness. Even when he is called upon to do no more than produce certain documents, "he would be at any time liable to make oath to the authenticity or origin of the articles produced." 8 Wigmore, *Evidence* (3d ed.) § 2264, p. 364. Such testimonial compulsion is specifically prohibited by the Fifth Amendment. See *Curcio* v. *United States*, 354 U.S. 118, 125.[10] As this

[9] As indicated by the court of appeals (App. A, *infra*, p. 5a), the government agreed in this case that production of the records in question could properly be refused if sought by summons.

[10] *Boyd* v. *United States*, *supra*, relied on by the court below, involved a subpoena issued to the accused personally; it therefore presented a most straightforward self-incrimination claim (116 U.S. at 638–641, Miller, J., concurring). Even if the object sought by subpoena in *Boyd* had been a weapon or contraband or fruits of a crime, the Fifth Amendment privilege against self-incrimination would have entitled the defendant to refuse to comply because in responding to the subpoena he would have to produce and authenticate the incriminating evidence. See *Curcio* v. *United States*, *supra*, 354 U.S. at 125; *United States* v. *White*, 322 U.S. 694, 698–699. Indeed, it seems quite clear from more recent decisions that the vice in *Boyd* was precisely that the invoice was sought by subpoena rather than by warrant; the Court has held since *Boyd* that documents similar in kind to the paper sought in that case are instrumentalities of crime and may be seized as such. *Marron* v. *United States*, *supra*; *Zap* v. *United States*, 328 U.S. 624.

Court declared in *United States* v. *White, supra,* 322 U.S. at 698–699:

> The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals. It grows out of the high sentiment and regard of our jurisprudence for conducting criminal trials and investigatory proceedings upon a plane of dignity, humanity and impartiality. It is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him. Physical torture and other less violent but equally reprehensible modes of compelling the production of incriminating evidence are thereby avoided. The prosecutors are forced to search for independent evidence instead of relying upon proof extracted from individuals by force of law. * * * [The privilege] protects the individual from any disclosure, in the form of oral testimony, documents or chattels, sought by legal process against him as a witness.

A search and seizure, on the other hand, involves no disclosure, production or authentication by the accused himself. See generally 8 Wigmore, *Evidence* § 2264. As Professor Chafee observed, "the privilege is violated when a man is compelled to do something active, whereas he usually remains passive during an unreasonable search and seizure." Chafee, *The Progress of the Law,* 1919–1922, 35 Harv. L. Rev. 673, 697–698 (1922). With repect to a search and seizure of business records, even more than with respect to

other conduct which has been held not within the privilege against self-incrimination, the accused's "participation * * * [is] irrelevant." *Schmerber* v. *California,* 384 U.S. 757, 765.

Accordingly, it does not follow that because production of the identical papers could be successfully resisted if sought by summons or subpoena, they must be accorded immunity from reasonable searches and seizures, based on probable cause, pursuant to a search warrant meeting the standards of the Fourth Amendment. As the Second Circuit stated in *United States* v. *Bennett, supra,* 409 F. 2d at 896, "the Fourth Amendment does not protect broadly against the seizure of things whose compulsory production would be forbidden by the Fifth." See also *State* v. *Bisaccia, supra,* 45 N.J. 504, 509, 213 A. 2d 185, 188.

5. Moreover, we think it is not insignificant that the taxpayer's separate set of financial records involved here is more than "mere evidence." These records are, in a very real sense, an "instrumentality" for effecting the crime of evasion of taxes. See Rule 41 (b), Fed. R. Crim. P. This Court has repeatedly affirmed that private papers of an individual may be

seized and introduced into evidence if the papers were used in a criminal operation. See *Marron* v. *United States, supra; United States* v. *Lefkowitz, supra; Davis* v. *United States,* 328 U.S. 582; *Zap* v. *United States, supra; Harris* v. *United States, supra; Abel* v. *United States,* 362 U.S. 217. And whatever vitality the court below has found to remain in *Gouled* v. *United States,* 255 U.S. 298, seems to support that result (see n. 6, *supra*). See also *Warden* v. *Hayden, supra,* 387 U.S. at 321 (Douglas, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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SEPTEMBER 1971.

APPENDIX A

In the United States Court of Appeals for the Seventh Circuit

(September Term 1970—January Session 1971)

No. 18487

VINCENT R. HILL, APPELLANT

v.

JAY G. PHILPOTT, District Director of Internal Revenue, THOMAS VICARS, LE ROY WISE, JOHN HOHMANN, RALPH RANALETTA, FRANK E. STRANG, and OTHER UNKNOWN AGENTS OF INTERNAL REVENUE SERVICE, APPELLEES

Appeal from the United States District Court for the Southern District of Illinois, Southern Division

May 17, 1971

Before DUFFY, *Senior Circuit Judge,* FAIRCHILD, *Circuit Judge* and CAMPBELL, *Senior District Judge.**

CAMPBELL, *Senior Judge.* This case concerns the extent to which a citizen's personal books and records are protected by the Fourth and Fifth Amendments against seizure by the government. Petitioner-Appellant, Dr. Vincent R. Hill commenced this action in the district court by seeking a rule to show cause why certain properties seized pursuant to search warrants should not be returned and suppressed on the grounds

*Senior Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

that the seizure was in violation of his constitutional rights under the Fourth and Fifth Amendments. The district court denied the petition and refused the request for the return or suppression of the property. Its memorandum opinion is reported as *United States v. Premises, 801 North Seventh Street*, 310 F.Supp. 1316 (S.D. Ill. 1970). This appeal followed.

The facts giving rise to this somewhat unusual proceeding are as follows. Dr. Hill, a licensed physician and surgeon, has been engaged in the practice of medicine in Springfield, Illinois for more than twenty years. On February 19, 1970, a special agent of the Intelligence Division of the Internal Revenue Service presented to the district court applications for search warrants directed against Dr. Hill's residence and office. In support of the applications for warrants, the special agent presented the affidavits of four former employees of Dr. Hill detailing his office procedures which indicated that the financial records relating to certain patients were kept separate from the general patient and financial records. The records relating to these patients were called "Red Letter Folders." One former employee stated in her affidavit that the employees were directed, "that if any tax man visited the office to make an investigation, one employee should occupy him in the receptionist's area and the other employee was to incinerate all of the 'red letter folders' contained in the office in the automatic incinerator."

An affidavit of a "Red Letter" patient of Dr. Hill stated that at least one or two checks tendered to Dr. Hill for visits showed a second endorsement by Myers Brothers Department Store in Springfield. The affidavit of the special agent concluded, that based on his experience there was probable cause to believe that the actions and practices described by the former

employees of Dr. Hill, "were analogous with conduct such as: (1) keeping a double set of books, (2) making alterations, (3) concealing sources of income, and (4) destroying or proposing to destroy records in furtherance of concealment, and are designed to prevent or controvert discovery of the omission." The affidavit further concluded, "All of such acts and conduct constituted an attempt to evade or defeat income tax laws in violation of Title 26, U.S.C. § 7201. . . ".

The district court found that the affidavits established "probable cause" for the issuance of the warrants and, "also established that the papers, books, records, and documents sought to be seized were the instrumentalities by which the crimes of wilfully attempted tax evasion had been and were then being committed, as well as evidence of the crimes of wilfully attempted tax evasion." 310 F.Supp. at 1320. Two search warrants directed to Dr. Hill's residence and office were issued. The warrants described the objects of the search in terms which included most if not all of the financial and medical records maintained by Dr. Hill. The property to be seized as recited in the warrants is set forth in the margin.[1]

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[1] "fiscal records relating to the income and expenses of Dr. Vincent R. Hill from his medical practice and other sources since January 1, 1963, including but not limited to control records and ledger cards compiled and kept by use of a Burroughs machine bookkeeping system; log books; or journals; copies of receipts covering payments of fees; appointment books; records of visitations of patients away from the medical office; patients folders and their contents; adding machine tapes; bank deposit slips; bank statements; cancelled checks; copies of federal income tax returns; and divers other records of financial transactions which are intended for use in violating the provisions of the Internal Revenue laws or regulations prescribed thereunder, or which have been so used; particularly Sections 7302 and 7201 of the Internal Revenue Service

Agents of the I.R.S. searched the office and home of Dr. Hill that same day and seized and removed thirty-five (35) cardboard cartons comprising what the agents described as a "truckload of books, records, and papers." The next day Dr. Hill presented his petition for an order directing that the property seized be returned and suppressed on the grounds that the seizure was in violation of the petitioner's constitutional rights, particularly under the Fourth and Fifth Amendments. No criminal proceedings are pending against Dr. Hill.

In this court, as in the court below, Dr. Hill urges three propositions: (1) the seizure of his private books, papers and documents in the manner described above violated his privilege against self-incrimination as contained in the Fifth Amendment to the Constitution; (2) the broad language in the search warrants constitutes "a general warrant" and the search was therefore unreasonable and in violation of his constitutional rights under the Fourth Amendment to the Constitution; and (3) the seizure of his books and records under the warrants and in the manner as described above deprived him of his property without due process of law in violation of the Fifth Amendment to the Constitution.

The district court considered and rejected all three contentions and denied Hill's petition for the return of the property and the suppression of the evidence. We consider only the first contention, which is based on the petitioner's privilege against self-incrimination.

The first premise in Dr. Hill's self-incrimination argument, and one which is not refuted by the gov-

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laws (26 U.S.C. 7302–7201). Said records also comprise evidence of criminal offenses in violation of the laws of the United States within the meaning of Section 3103(a), 18 U.S.C."

ernment, is that many if not all of the records seized are records which if sought by subpoena or summons are generally considered privileged from disclosure by a taxpayer under the Fifth Amendment.[2]

In numerous cases where the Internal Revenue Service has sought court enforcement of its summons pursuant to statute (26 U.S.C. § 7402), courts have held that a taxpayer may refuse production of personal books and records by assertion of his privilege against self-incrimination. See, *e.g., Stuart* v. *United States,* 416 F.2d 459 (5th Cir. 1969); *United States* v. *Cohen,* 388 F.2d 464 (9th Cir. 1967); *United States* v. *Kleckner,* 273 F. Supp. 251 (S.D. Oh. 1967) app. dism. 382 F.2d 1022 (6th Cir. 1967).

As indicated, the government admits that production of the records in question could properly be refused if sought by summons. It argues, however, that because the records in this case were obtained pursuant to a search warrant proper in form, the only question is whether the warrant was issued in compliance with the Fourth Amendment as implemented by the United States Code and the Federal Rules of Criminal Procedure. See 18 U.S.C. § 3103(a); Rule 41, F. R. Crim. Proc. It thus diminishes Dr. Hill's self-incrimination argument to what it describes as, "an abortive assault on the constitutionality of Rule 41 (e) of the Federal Rules of Criminal Procedure," which authorizes the issuance of search warrants based on probable cause, supported by oath or affirmation,

[2] It is notable that the government does not suggest that the records are producible and not privileged under the "required records doctrine" enunciated in *Shapiro* v. *United States,* 335 U.S. 1 (1948). It seems apparent however, that records maintained by an individual taxpayer exceed the constitutional limits of the required records doctrine. See *Grosso* v. *United States,* 390 U.S. 62 (1968).

and particularly describing the place to be searched, and the persons or things to be seized.

In short, the government takes the position that once the validity of a search is established under the Fourth Amendment—and by that fact alone—the Fifth Amendment is not and cannot be violated.

The relationship between the Fourth and Fifth Amendments as each pertains to an individual's right to refuse the production of his personal books and records is not a new problem to the courts. As early as *Boyd* v. *United States*, 116 U.S. 616 (1885), the Supreme Court discussed the "intimate relation" between the two Amendments. In *Boyd,* the defendant was ordered to produce an invoice relating to several cases of glass which were alleged to have been fraudulently imported. The production order was based on a statute which required production and which further provided that failure to so produce would serve as an admission of the offense alleged. In discussing the "intimate relation" between the two Amendments the Court stated (at p. 633):

> ". . . compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."

Although the *Boyd* case involved a court-issued production order and not a search and seizure,[3] its

[3] See concurring opinion of Mr. Justice Miller, 116 U.S. at 638; see also 8 Wigmore on Evidence § 2264, n.4. It is clear, however, that the Fourth Amendment's protection against un-

reasoning was relied on by the Supreme Court in a later case, *Gouled* v. *United States,* 255 U.S. 298 (1921), which did involve a search made pursuant to a warrant. In that case the defendant was charged with defrauding the government in certain procurement contracts. Documents were taken from his office and used as evidence against him over his objection that their seizure and introduction into evidence violated his Fourth and Fifth Amendment rights.

In considering these contentions raised in *Gouled,* the Supreme Court first distinguished the seizure of "mere evidence" as opposed to the seizure of the "instrumentalities of a crime." The distinction was essential because, under the theory prevailing at that time, the government's right to seize evidence and the right of a citizen to resist such seizure were both dependent upon the property interest each could assert as to the evidence sought to be seized. If the property was the fruits of a crime, *e.g.,* stolen goods, or the instrumentalities of a crime, the property rights in these items were considered forfeited to the State and were contraband. The government thus had a right to seize such property. If the property was not the fruits or instrumentalities of a crime it was not subject to seizure. In *Gouled,* the Court held that the papers seized were not "instrumentalities of a crime," which would have permitted their seizure, but were rather "mere evidence" and, therefore, the seizure was in violation of the Fourth Amendment and their admission into evidence would be a violation of the Fifth Amendment.

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reasonable search and seizure may be violated by a court order to produce evidence. See *In Re Antonio Dionisio and Charles Bishop Smith, witnesses before the Special February 1971 Grand July* (71-1155, 7th Cir. March 25, 1971).

The teachings of *Gouled* concerning the Fourth Amendment were thoroughly reconsidered in *Warden* v. *Hayden,* 387 U.S. 294 (1967). The "mere evidence" theory was overruled and the property concept was rejected in favor of an approach which looks more to the rights of privacy which the Fourth Amendment was intended to protect rather than the property claims the parties might assert.

Thus a search and seizure may be unreasonable under the Fourth Amendment even though the government asserts superior property rights in the property seized.

> "We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts."
>
> * * *
>
> "And with particular relevance here, we have given recognition to the interest in privacy despite the complete absence of a property claim by suppressing the very items which at common law could be seized with impunity: stolen goods, *Henry* v. *United States,* 361 U.S. 98; instrumentalities, *Beck* v. *Ohio,* 379 U.S. 89; *McDonald* v. *United States, supra*; and contraband, *Trupiano* v. *United States,* 334 U.S. 699; *Aguilar* v. *Texas,* 378 U.S. 108." (387 U.S. at 304–6).

The *Warden* decision thus eliminates any distinction as between items which may be considered "mere evidence" and those which may be "fruits or instrumentalities of a crime or contraband."[4] In overruling *Gouled* as to its Fourth Amendment teachings,

[4] In response to the *Warden* decision, Congress adopted a statute which authorizes the issuance of a warrant to search for and seize "mere evidence," 18 U.S.C. § 3103(a).

we do not believe that the Court intended to in any way diminish the Fifth Amendment characteristics which might attach to certain items of property such as personal books and records. Indeed, the Fifth Amendment holding of *Gouled* which concluded that the documents there at issue were protected appears still to be applicable, as that aspect of the case was not mentioned in the *Warden* opinion.

In the previous term, the Court in *Schmerber* v. *California,* 384 U.S. 757 (1966), clearly intimated that in any case where a seizure under the Fourth Amendment also involves Fifth Amendment claims, the first step in considering a motion to suppress is to determine whether the introduction into evidence of the material seized would violate the Fifth Amendment. This is to be determined by inquiry as to whether the evidence "relates to some communicative act or writing." If it does, the search is barred under both Amendments.

Significantly, the *Warden* Court immediately distinguished the nature of the evidence seized in that case from the books and papers involved in both *Boyd* and *Gouled.*

> "The items of clothing involved in this case are not testimonial or communicative in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment. *Schmerber* v. *California,* 384 U.S. 757. This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure." (387 U.S. at 302–3).

The government argues that the evidence here at issue is not testimonial or communicative in nature

because its introduction into evidence will not violate the Fifth Amendment privilege—because its seizure did not violate the Fourth Amendment. But this constitutional question begging is little help in our effort to resolve the issue before us. Whether the evidence seized is "testimonial" or "communicative" in nature is the *first step* in the process in determining whether it may be privileged. If it is testimonial or communicative the privilege may apply.

The government also argues that the Fifth Amendment is not applicable because, unlike the circumstances when it proceeds by summons, no compulsion is involved in this case. This theory is best articulated by Dean Wigmore, in his treatise on evidence,[5] wherein he opines that there is no compulsion, because, "the proof of their authenticity, or other circumstances affecting them, may and must be made by the testimony of other persons, without any employment of the accused's oath or testimonial responsibility."

This theory has also been accepted by other writers. See Duke, Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid, 76 Yale L.J. 1, 47 (1966). The writer there relies on the theory—since discredited in *Warden* v. *Hayden*—that these books or records may be instrumentalities of a crime and adds, "And if a valid search warrant is obtained, the agent may seize the taxpayer's books and avoid the fetters of the Fifth Amendment, since he has not compelled the taxpayer to produce any evidence, but has required him merely to step aside while the agent helps himself." See also, Comment, the Fourth and Fifth Amendments—Dimensions of an "Intimate Relationship", 13 U.C.L.A. L. Rev. 857, 864 (1966).

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[5] 8 Wigmore on Evidence, § 2264.

In our view, and we believe in the view of the Supreme Court, Dean Wigmore's distinction between obtaining papers from a defendant by search and seizure rather than by force of process is more shadow than substance. As well stated by the Supreme Court in *Gouled, supra,* at p. 306:

> "In practice the result is the same to one accused of crime, whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers. In either case he is the unwilling source of the evidence, and the Fifth Amendment forbids that he shall be compelled to be a witness against himself in a criminal case."

The Supreme Court has reiterated this principle in subsequent cases, see *Agnello* v. *United States,* 269 U.S. 20 (1925) and *United States* v. *Lefkowitz,* 285 U.S. 452 (1932), and the same proposition appears implicit in the Court's rationale in both *Warden* v. *Hayden,* 387 U.S. 294 (1967) and *Schmerber* v. *California,* 384 U.S. 757 (1966).

Dean Wigmore's suggestion that there is no compulsion to testify because proof of authenticity must come from others without the help of the accused sounds well as an abstract proposition, but certainly ignores the realities of trial. The jury knows the books and records belong to the defendant and the entries he has made therein speak against him as clearly as his own voice. This seems particularly true in a prosecution for violation of the income tax laws.

In recent years this court has zealously guarded the Fifth Amendment rights of citizens confronted with possible penalties or prosecutions for violation of income tax laws. In *United States* v. *United States Coin and Currency in the Amount of $8674.00,* 393

F.2d 499 (1968) aff'd., April 5, 1971, Supreme Court No. 5—October Term, 1970, we held that the petitioner there could properly assert his Fifth Amendment privilege in a forfeiture proceeding brought pursuant to 26 U.S.C. § 7302. In *United States* v. *Dickerson,* 413 F.2d 111 (1969), we held that the *Miranda* warnings must be given to a taxpayer under criminal investigation by the Internal Revenue Service at the inception of the first contact with the taxpayer after his case has been transferred to the Intelligence Division of the Internal Revenue Service for possible criminal prosecution. See also, *United States* v. *Lackey,* 413 F.2d 655 (1969); *United States* v. *Habig,* 413 F.2d 1108 (1969). We would vitiate the effects of those decisions if we ruled today that the government could avoid all Fifth Amendment considerations by merely obtaining a search warrant.

In deciding this case as we do, we are not unmindful of the very difficult task that confronts the Internal Revenue Service in meeting its responsibility to enforce the income tax laws. There is no evidence, however, that the availability of the privilege against self-incrimination has unduly interfered with prosecutions which result from investigations wherein taxpayers' book and records have been sought by a summons. We believe the same experience will prove true in future cases involving searches and seizures.[6] Of course, the Fifth Amendment makes the business

[6] On oral argument government's counsel suggested that it would have proceeded by summons in this case, but the defendant would have destroyed the records. Of course his destruction of the records would have been a pointless gesture, because as the government has been willing to admit, had it proceeded by summons, he could have relied on the Fifth Amendment privilege and refused production. Furthermore, destruction of books and records by a taxpayer itself provides

of criminal prosecutions more difficult but this is its clear intent.

The order of the district court is reversed and the cause is remanded with directions to reconsider the taxpayer's petition in light of this opinion.

FAIRCHILD, *Circuit Judge* (dissenting). One of appellant's arguments was that the warrant failed to fulfill the fourth amendment requirement that the things to be seized be "particularly" described. The majority decision is based on a different ground, and I assume, for the present purpose, that the warrant was sufficient in this respect. I also assume the appealability of the order.

In *Warden* v. *Hayden* (1967), 387 U.S. 294, 303, the Supreme Court found it unnecessary to "consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure." In order to suppress the evidence in this case, it would be necessary to decide both that such class does exist, and that the business and professional records seized from appellant are within it.

Such a class would be difficult to define whether one were basing its existence on the policy underlying the fourth amendment or the fifth. Judge Friendly suggested in *United States* v. *Bennett* (2d Cir. 1969), 409 F2d 888 "that an approach geared to the objective of the Fourth Amendment to secure privacy would seem more promising than one based on the testimonial character of what is seized." He also noted that *Katz* v. *United States* (1967), 389 U.S. 347, 354, authorized

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strong evidence of willfulness and concealment. *United States* v. *Holovachka*, 314 F.2d 345 (7th Cir. 1963); Balter, Tax Fraud and Evasion (3d Edit.) Section 13.3–5.

warrants for limited surveillance of telephone communications, but that such communications, like papers, would often be "testimonial."

Assuming, however, that there is a class of papers so intimately confidential and so much a part of personhood that they ought to enjoy a superlative privacy and be protected from seizure upon an adequately grounded warrant, it does not seem to me that the records in question here have the required character. They appear to have been maintained for business and professional purposes, with the knowledge and assistance of employees, and the manner in which they were allegedly kept and used, made them, in a sense, instrumentalities of the tax evasion offense claimed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Monday, May 17, 1971.
Before Honorable F. Ryan Duffy, Sr. Circuit Judge,
Honorable Thomas E. Fairchild, Circuit Judge, and
Honorable William J. Campbell, Sr. District Judge

VINCENT R. HILL, APPELLANT

v.

JAY G. PHILPOTT, District Director of Internal Revenue, et al., Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Illinois, Southern Division and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby reversed, with costs, and that this cause be, and it is hereby, remanded to the said District Court with directions to reconsider the taxpayer's petition in light of the opinion of this Court filed this day.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION

(Miscellaneous 70–4 and Miscellaneous 70–5)

UNITED STATES OF AMERICA

v.

PREMISES, 801 NORTH SEVENTH STREET

UNITED STATES OF AMERICA

v.

PREMISES, 85 ISLAND BAY LANE

VINCENT R. HILL, PETITIONER

v.

JAY G. PHILPOTT, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL., RESPONDENTS

MEMORANDUM AND ORDER

These proceedings come before the Court on the petition of Vincent R. Hill for an order to show cause which I have treated as a motion for return of property and to suppress evidence under Rule 41(e) of the Federal Rules of Criminal Procedure. The petitioner requested an immediate hearing on his petition whereby he seeks "the immediate return of books, records, and papers and other things taken from petitioner's office, home and possession on February 19, 1970;" and "the suppression of all books, papers and

other things taken from his said office, home and possession on February 19, 1970, and the suppression of any and all evidence developed or arising from the use thereof." The Petitioner filed an amendment to his petition on February 24, 1970, the date on which the hearing herein was held; and he filed a further amendment thereto on February 27, 1970.

The facts giving rise to the petition are as follows: The petitioner is a licensed physician and surgeon who has been engaged in the practice of medicine at Springfield, Illinois, in excess of 20 years. He resides at 85 Island Bay Lane, Springfield, Illinois, and he maintains an office for the practice of his profession at 801 Seventh Street, Springfield, Illinois. On February 19, 1970, I, as a United States District Judge, at Springfield, Illinois, issued two search warrants: one was directed to Dr. Hill's residence; the other to his office. The warrants were issued on the affidavit of Ralph Ranalletta, a special agent of the Internal Revenue Service, and the supporting affidavits of Mrs. Arlene Struchtemeyer, Sandra O'Neil, Mrs. Betty White, Gail Gunther Schielke, all former employees who had assisted Dr. Hill in his office practice and who, in various capacities and under the direction and supervision of Dr. Hill and his wife—June—made and kept various records, including the fiscal records with respect to Dr. Hill's patients. The affidavits of special agent Ranalletta, upon which the two search warrants were issued, set forth, respectively, that there was then being concealed certain property, namely:

> "fiscal records relating to the income and expenses of Dr. Vincent R. Hill from his medical practice and other sources since January 1, 1963, including but not limited to control records and ledger cards compiled and kept by

use of a Boroughs machine bookkeeping system; log books; or journals; copies of receipts covering payments of fees; appointment books; records of visitations patients away from the medical office; patients folders and their contents; adding machine tapes; bank deposit slips; bank statements; cancelled checks; copies of federal income tax returns; and divers other records of financial transactions which are intended for use in violating the provisions of the Internal Revenue laws or regulations prescribed thereunder, or which have been so used; particularly Sections 7302 and 7201 of the Internal Revenue Service laws (26 U.S.C., 7302–7201). Said records also comprise evidence of criminal offenses in violation of the laws of the United States within the meaning of Section 3103(a), 18 U.S.C.," and that "All of such [Petitioner's] acts and conduct constituted an attempt to evade or defeat income tax laws in violation of Title 26, United States Code, Section 7201 * * *."

Upon the showing made before me, I issued two search warrants which authorized special agent T. Ralph Ranaletta and other special agents of the Intelligence Division of the Internal Revenue Service to search the premises described, respectively, for the above described records for the period January 1, 1963 to the date of the search warrants, stating that there was probable cause to believe that the property so described was being concealed on the premises described in the respective warrants and that the grounds stated in the application for the issuance of the respective warrants existed. The search for and the seizure of various books, records, etc., took place on February 19, 1970, at the places described in the two search warrants, respectively, and a return thereof thereafter was duly made. On February 20, 1970,

on the Petitioner's oral motion the Court issued an order restraining the Government from photographing or in any way using the seized records until such time as the Court could hear the Petitioner's motion or motions. That order of restraint has been in effect until the date of the issuance of this order. Furthermore, the Internal Revenue Service was ordered to make available to the petitioner, at any time, upon reasonable notice, photographic copies of any of the seized records needed by the petitioner in the conduct of his medical practice.

Petitioner does not challenge the validity of the search warrants as such; nor does he attack the probable cause upon which each of the applications for a search warrant was based. The issues he poses are: (1) whether a search warrant can validly issue, under the provisions of Rule 41(b) of the Federal Rules of Criminal Procedure, for the seizure of his private books, papers and documents in the face of the privilege against self-incrimination conferred upon him by the Fifth Amendment to the Constitution of the United States;[1] (2) whether the sweep of the language in the search warrant describing the property to be seized is indiscriminative and violative of his constitutional rights under the Fourth Amendment to be secure against unreasonable searches;[2] and (3) whether the seizure of Petitioner's books and records

[1] nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

[2] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

under the search warrants deprived him of his property without due process of law in violation of the Fifth Amendment.

The search warrants with which we are here concerned were issued by me upon a showing of probable cause supported by the oath of T. Ralph Ranalletta and the supporting oaths of Mrs. Arlene Struchtemeyer, Sandra O'Neill, Mrs. Betty White and Gail Gunther Schielke. Each search warrant described with particularity the place to be searched and the things to be seized. Petitioner contends that the seizure of his personal books, papers and documents violated his rights under the Fourth and Fifth Amendments. The short answer to that contention was stated by the Supreme Court in *Boyd* v. *United States,* 116 U.S. 616, 624 (1885) as follows:

> The entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of a judicial writ . . . is not within the prohibition of the Fourth or Fifth Amendment, or any other clause of the Constitution.

The Fourth Amendment does not denounce all searches and seizures; it denounces only such searches and seizures as are unreasonable. *Carroll* v. *United States,* 267 U.S. 132, 147 (1924); *United States* v. *Rabinowitz,* 339 U.S. 56, 60 (1949).

Authority to issue search warrants is conferred upon a judge of the United States, a state, commonwealth or territorial court of record and a United States Commissioner within the district wherein the property sought is located by Rule 41(a) of the Federal Rules of Criminal Procedure. The grounds for issuance of

a warrant are stated in Rule 41(b).[3] On June 19, 1968, the Omnibus Crime Control and Safe Streets Act of 1968 (Public Law 90-351, Title IX) amended Rule 41 by adding an additional ground for issuing a warrant as follows:

> Section 3103(a). Additional grounds for issuing warrant.
>
> In addition to the grounds for issuing a warrant in Section 3103 of this title, [Rule 41 of the Federal Rules of Criminal Procedure], a warrant may be issued to search for and seize any property which constitutes evidence of a criminal offense in violation of the law of the United States.

The Fourth Amendment protects against the unreasonable search and seizure of persons, houses, papapers and effects. At the time of the searches and seizures with which we are here concerned, the Petitioner was not arrested, nor is he presently under arrest. The seizures that were made under the search warrants were the seizures of the Petitioner's fiscal records relating to the income and expenses of his medical practice for the period January 1, 1963 to February 19, 1970—the date on which the search warrants were issued—including but not limited to,

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[3] (b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property

(1) Stolen or embezzled in violation of the laws of the United States; or

(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U.S.C., § 957. As amended Dec. 27, 1948, eff. Oct. 20, 1949.

> "fiscal records relating to the income and expenses of Dr. Vincent R. Hill from his medical practice and other sources since January 1, 1963, including but not limited to control records and ledger cards compiled and kept by use of a Burroughs machine bookkeeping system; log books; or journals; copies of receipts covering payments of fees; appointment books; records of visitations of patients away from the medical office; patients folders and their contents; adding machine tapes; bank deposit slips, bank statements; cancelled checks; copies of federal income tax returns; and divers other records of financial transactions which are intended for use in violating the provisions of the Internal Revenue Laws or regulations prescribed thereunder, or which have been so used; particularly Sections 7302 and 7201 of said Internal Revenue Service laws (26 U.S.C. 7302–7201). Said records also comprise evidence of criminal offenses in violation of the laws of the United States within the meaning of Section 3103(a), 18 U.S.C."

There is no special sanctity in papers, as distinguished from other forms of property, which renders them immune from search and seizure. *Gouled* v. *United States,* 255 U.S. 298, 309 (1920); *Marron* v. *United States* 275 U.S. 192, 199 (1927); *Stanford* v. *Texas,* 379 U.S. 476, 485, fn. 16 (1964). Rule 41(b) of the Federal Rules of Criminal Procedure provides that a warrant may be issued thereunder to search for and seize any property" . . . (2) designed or intended for use or which is or has been used as the means of committing a criminal offense; or (18 U.S.C. Sec. 3103(a)) any property that constitutes evidence of a criminal offense in violation of the laws of the United States." Ranalletta's affidavits for search warrants not only provided the probable cause for the

issuance of the search warrants but also established that the papers, books, records, and documents sought to be seized were the instrumentalities by which the crimes of willfully attempted tax evasion had been and were then being committed, as well as evidence of the crimes of willfully attempted tax evasion. As instrumentalities of a crime they were subject to forfeiture under Section 7302 of the Internal Revenue Code and as evidence, they were subject to seizure under 18 U.S.C.A. Section 3103(a). See also *Warden* v. *Hayden,* 387 U.S. 294, 309–310 (1966). Moreover, as to what was to be taken pursuant to the search warrants, the description in the warrants of the papers to be seized left nothing to the discretion of the officers executing the search warrants. *Marron* v. *United States,* 275 U.S. 192, 196 (1927).

Petitioner contends that the seizure of his records violates his constitutional right to due process in that it denies him the right to practice his profession free from unreasonable governmental interference. His contention is devoid of merit. The search warrants were issued in compliance with the requirement of the Fourth Amendment and Rule 41 of the Federal Rules of Criminal Procedure.

On Petitioner's motion I entered a temporary order enjoining the Respondents from using the seized papers and documents in any manner pending the further order of this court; and I ordered the Respondents to provide the Petitioner with photographic copies of any and all records he might require in order to carry on his medical practice. Petitioner has made no showing that he has been prevented from carrying on, or that he has been deprived of his right to carry on the practice of his profession; nor has he shown that Respondents have denied him access to the seized

papers and documents for the purpose of photographing or copying any such paper or document that he requires in the conduct of his medical practice. Inasmuch as the search warrants under consideration were issued upon a showing that probable cause existed for the belief that the Petitioner's books, papers and documents were intended for use and had been used by him in committing the offenses of willfully attempted tax evasion in violation of Section 7201 of the Internal Revenue Code for the years 1963 to 1969, inclusive, the seizures under the warrants did not infringe upon Petitioner's right to due process of law.

Accordingly, Petitioner's motion for the return of property and the suppression of evidence, as amended, is hereby denied.

It Is Ordered that within 20 days from the date of the issuance of this Memorandum and Order the Respondents shall provide the Petitioner with photographic or electronically duplicated copies of all books, papers and documents that were seized under the authority of the search warrants.

Dated this 30th day of March, 1970.

By the Court:

OMER POOS, *Chief Judge.*

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

July 29, 1971

Before F. RYAN DUFFY, Sr., *Circuit Judge,* THOMAS E. FAIRCHILD, *Circuit Judge,* and WILLIAM J. CAMPBELL, Sr., *District Judge*

No. 18487

VINCENT R. HILL, PETITIONER-APPELLANT

v.

JAY G. PHILPOTT, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL., RESPONDENTS-APPELLEES

Appeal from the United States District Court for the Southern District of Illinois, Southern Division

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and a majority of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a hearing in the above-entitled cause be and the same is hereby denied.

APPENDIX E

AFFIDAVIT

United States of America Southern Judicial, District of Illinois } *ss*

I, Gail Gunther Schielke, state that:

I reside at Springfield, Illinois, Where I am employed at Springfield High School as an attendance clerk. I was an office employee of Doctor Vincent R. Hill in his medical offices from about mid-March 1967 to late October 1968. It was at the latter date when I notified Dr. Hill of my plans to wed and to move from the city about January 1. I had hoped to continue in his office until the end of December 1968; however, he replaced me shortly after my notice to him. I recall that Doctor Hill hired Phylis Porter at about the time he hired me. Phylis Porter and I performed the business office duties until her departure about two months after we were hired.

My principal duties involved business office activities. I occasionally assisted Mrs. Betty White with medical assistance tasks. My office duties included receiving patients, telephone answering, receiving and receipting for payments, maintaining accounts receivable, posting of daily receipts and paid expenses to a loose leaf or log book type record. A Burroughs adding machine was used to prepare and maintain patients' ledger cards. Ledger cards were usually segregated as to paid and unpaid. Patient medical folders were categorized as to regular and welfare cases as to paid and unpaid. Accounts turned over to a collection agency were kept in a separate grouping.

An office day commenced with the preparation of a roster of patients expected for the day and processing of the prior day's transactions. We usually removed a patient medical folder from the files prior to his appearance. I prepared a pink slip for new patients. Doctor Hill or Mrs. White would establish a medical patient folder on the occasion of the first visit. I learned my office routine f om Doctor Hill's wife June Hill and Mrs. White. Each of them contributed to the performance of business office tasks when necessary.

A patient was admitted to an examining room or treatment room unless he appeared only to pay an account or obtain a refill of drugs or medicines. The medical folder was placed in a box like arrangement which was affixed to the door of the room into which the patient had been ushered. Doctor Hill usually noted in the medical folder the fee for the visit together with directions, if any, for medicines, tests, or therapy. He sometimes orally informed me of fee amounts which I recorder. Mrs. White also recorded notations and fee amounts for the services administered. The patient medical folder was returned to me whereupon I summarized the charges and solicited payment of the account.

If payment was made when the fees were incurred or subsequent to a billing, I prepared a duplicate receipt form and certified payment in the medical folder. The receipt form was serially numbered and printed to show Doctor Hill's name and medical doctor designation. The receipt form in use at the point of my departure were of a self-duplicating non-carbon type. Receipt forms which were used prior to these were similar in makeup, but required the implementation of carbon paper. The original receipt form upon preparation was given to a patient, or sent to him up-

on request if it was a mailed remittance, or reserved for him in his medical folder, or were disposed of. Each day at the conclusions of office visits I compared the total of an adding machine tape of the amounts of checks and currency received that day to an adding machine total of the amounts depicted on duplicate receipt forms. Coins were merged into the office change fund and fractional dollar amounts were not included in summarizations of payments received. The checks, currency and tabulation thereof were placed into an envelope and given to Doctor Hill together with any notes directed to Mrs. Hill for postage stamps, coins for the office change fund, etc.

We maintained an office change fund of $20 in currency and accumulated coins. The adding machine tabulations of receipt form amounts were reserved for posting a black loose leaf record A Burroughs bookkeeping machine was used to record the date, explanation, charge and/or credit, and the ending balance, if any, to a patient ledger card which was maintained separately from the medical folder. A control or master sheet and carbon paper were implemented to the Borroughs carriage to provide a duplicate record on the control sheet of the data recorded on the ledger card. Entries directly to the control or master sheet consisted of the patient's name near the left margin and a recap of old and new balances next to the right margin. These balances contributed to a proof of the correctness of the posting process.

The charges to ledger cards were posted from the fee amounts recorded in the patient medical folder. The credits to the ledger cards were posted from the duplicate patient medical folder also. The billings to patients consisted of xerox reproductions of ledger account cards with unpaid balances.

Discrepancies, if any, between the totals of the amounts of charges and payments and proof data on the master or control sheets were resolved. These tapes and control sheets were accumulated for a monthly period. A comparison of a monthly tally of the duplicate receipt amounts to a tally of the daily tape totals for the same monthly period was made. Discrepancies, if any, were resolved. At least monthly the total of the charges reflected on the Burroughs master or control sheet for each day was entered into the loose leaf note book or log record in a column entitled "charges"; and the total of the duplicate receipt amounts for each day was entered into this same record in a column entitled "Paid" or "Payments."

The office employees did not prepare bank deposits, check endorsements, checks for Doctor or Mrs. Hill's signature, or bank reconciliations. Bank statements and other personal mail items were delivered unopened to Doctor Hill pursuant to existing procedure.

Mrs. Hill handled the dispositions of checks and currency presented daily to Doctor Hill. She also paid the invoices incident to the medical office and returned them to us for posting to the loose leaf notebook or log book. Any discrepancies necessitated that I call Mrs. Hill promptly and inform her of them. Telephone conversations with Mrs. Hill, visits by her to the office and notes to or from her were established routines for the necessary exchange of income and expense data.

Mrs. Hill periodically called us or notified us through Doctor Hill that an appointment had been set with their attorney to review the loose leaf notebook. She would request that the record book be sent home with Doctor Hill. This request necessitated that we update the posting of all daily totals of receipts which had been processed through the Burroughs and all amounts of paid expenses.

The various categories of postings to the loose leaf record were summarized for each monthly period and carried forward in a cumulative manner. Usually there were no year end calculations because of the cumulative aspect. The log book was returned promptly subsequent to its periodical presentation to the attorney. Most of the supporting data, e.g., tapes and invoices were accumulated by year periods and filed in the office. I do not recall which categories of records and papers were transferred to their residence nor when such transfers were made.

Doctor Hill on a daily basis, usually orally, informed me of hospital, nursing home, and house visits and the related fee for posting to the medical folder. He usually read the data from a small notebook which he carried. A single total charge for all hospital visits was made to the ledger account card when the patient was discharged from the hospital. Doctor Hill rendered services as a surgical assistant to other doctors and principally to the Springfield Clinic surgeons. They remitted a monthly payment to Doctor Hill for his assistance. I prepared a receipt form in duplicate. I entered a charge and credit for the amount to a ledger card in the Burroughs process designated for assistance fees. A folder was established to contain the original receipt form and other memoranda of the transaction.

At the time of my employment by Doctor Hill, both Mrs. Hill and Mrs. White, taught me office routines, e.g., the operating techniques of the Burroughs system, daily proof procedures, maintenance of the loose leaf record or log book, and routines for processing of checks and currency to be presented daily to Doctor Hill for conveyance to her. Mrs. White from time to time assisted me when procedures were unclear to me.

The instructions which I received included special instructions to handle the processing of one group of patients records in a manner different from that which I have described heretofore.

This group of medical folders was kept in the drug room remote from the medical folders of patients whose charges and payments were processed through the Burroughs system. A red star shaped or asterisk symbol was marked on each of these folders with a red colored felt marking pen or ink pen. These folders were commonly referred to as red letter cases by Doctor Hill, Mrs. Hill, and Mrs. White. They were usually stored in a wooden box in the drug room. At the close of each day, they, together with certain drugs and the office change fund, were locked in a kitchen type cabinet in the drug room. Doctor Hill selected the patient who was to be categorized as a red letter case.

Doctor Hill and Mrs. White reminded me to look for the red letter symbol on medical folders returned to me. The contents of these folders were usually not comprehensive.

When a patient whose medical folder had been categorized as a red letter case appeared for an office visit, the processing of his records differed from the processing of patients regularly processed through the Burroughs system.

Upon conclusion of an office visit by a red letter patient and the return of his medical folder to me, I would summarize the charges noted therein and solicit payment. If payment was made, I prepared a receipt in original form only from a book of untitled and unnumbered receipt forms which I understood were once regularly used in the office. These receipt forms were book bound in two part sets. The original

was perforated whereas the memorandum copy was designed to remain intact. We initially exhausted the perforated forms because of the ease of their removal. We ultimately tore or cut the copy portions from the book. Since no duplicate receipt was prepared in accordance with the special instructions for red letter cases, the forms, those which were designed to serve as originals and those as memorandums were issued only as originals. We usually imprinted on these receipt forms, by means of a rubber stamp, Doctor Hill's name and medical profession.

The medical folders categorized as red letter cases were periodically reviewed for unpaid balances.

Typewritten statements of amounts due were prepared and forwarded to each patient whose medical folder reflected an outstanding balance. Subsequent remittances by these patients were handled as though the payments were made incident to the visit at which the fees were incurred.

Charges and payments of fees incurred by patients categorized as red letter cases were recorded only in their medical folder. No ledger card was maintained in the Burroughs system for these patients while their medical folder was a part of the red letter category. Occasionally patients' medical folders were transferred from the red letter category and placed into the regular file of medical folders. A ledger card would be prepared in the Burroughs process in these instances to record transactions incurred immediately prior to and after the date of transfer.

Currency and checks received from patients who were categorized as red letter cases were placed into an envelope separate from the envelope which contained the Burroughs processed receipts. Coins received were merged into the office change fund and were not accounted for. The name of each red letter patient and the amount of his payment only in exact dollar amounts were recorded on the envelope in which they were contained.

At the close of a day a verification of the total of the contents to a total of the amounts recorded on the envelope was made. This envelope also was presented to Doctor Hill. The totals of these amounts received from red letter cases were never added to the totals of Burroughs processed receipts nor were they entered directly to the loose leaf or log book record. Since no ledger cards existed in the Burroughs process for the patients while they were included in the red letter category and no duplicate receipt record was prepared, no postings or summarizations of them were contained in the Burroughs process. At no time after each return of the loose leaf or log record from its presentation to the attorney did I ever make or observe recordings of any medical receipts other than those processed in the Burroughs system.

Patients whose files were to be categorized as red letter cases were sometimes drawn from non-insurance cases, patients who appeared infrequently, patients who paid at time of visits, and patients who appeared for refills of prescriptions.

Red letter transactions occurred regularly. I believe most office days included some of these transactions.

On several occasions I inadvertently prepared a two part serially numbered receipt form for fees received from a red letter case. During the proof and posting processes this would become evident. I was instructed by Mrs. White to void the memorandum copy of the receipt. It usually remained intact. Since the red letter patient had left with an original receipt form, no other receipt form was deemed necessary. The amount of the red letter case payment having been included with the receipts to be processed in the Burroughs system necessitated that I call Mrs. Hill and inform her that certain fee amount(s) were to be removed from the category of receipts and included with the other category, e.g., red letter cases.

Discrepancies found at subsequent dates involving the red letter cases were not easily resolved because of the lack of preparation of duplicate receipt forms in red letter cases and the daily transmittal to the residence of that envelope on which were recorded the names of red letter cases and fees paid by them. This necessitated either a review of the red letter cases for a record of payments of a certain date or communications with Mrs. Hill at the Hill's home in order to have her relate names and amounts recorded on the envelope(s).

My husband, Fred Schielke, who I was dating, visited Doctor Hill as a medical patient about Spring of 1968. I believe that his medical folder was in the category of red letter cases because I sought out his medical folder to determine his ailment.

I was not involved with the transfer and removal of records from the medical offices to any other place including the Hill residence. I do not recall that Mrs. Hill ever returned any of the envelopes which had red letter patients' names and fee amounts recorded thereon to the office. Neither did she ever send any records of bank deposits to the office.

I have read the foregoing statement consisting of 11 pages, each of which I have signed. I fully understand the statement and it is true, accurate and complete to the best of my knowledge and belief. I made the corrections shown and placed my initials opposite each. I made this statement freely and voluntarily without any threats or rewards, or promises of reward having been made to me in return for it.

(S)GAIL GUNTHER SCHIELKE.

Subscribed and sworn to before me this 16th day of January, 1970 at Springfield, Illinois.

(S)T. RALPH RANALLETTA,
Special Agent, Internal Revenue Service.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-442

JAY G. PHILPOTT, District Director of Internal Revenue, et al.,
Petitioners,
v.
VINCENT R. HILL,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals is reported *Hill v. Philpott,* 445 F.2d 144. The opinion of the District Court is reported *sub nom. United States v. Premises, 801 North Seventh Street,* at 310 F.Supp. 1316.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

The only question considered by the Court of Appeals was that of Petitioner's privilege against self-incrimination (445 F.2d 144, at 146), or, whether the privilege against self-incrimination afforded by the Fifth Amendment extends to and protects against the seizure of a taxpayer's books, papers and documents, by search warrant issued under Rule 41(b) of the Federal Rules of Criminal Procedure.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment of the United States Constitution provides in relevant part:

> No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

Section 3103 of Title 18, United States Code, provides:

> Sec. 3103. *Grounds for issuing search warrant — (Rule).*

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

> Grounds prescribed for issuance of search warrant, Rule 41 (b).

Section 3103a of Title 18, United States Code, provides:

> Sec. 3103a. *Additional grounds for issuing warrant.* In addition to the grounds for issuing a warrant in

> Section 3103 of this title, a warrant may be issued to search for and seize any property that constitutes evidence of a criminal offense in violation of the laws of the United States. . . .

Rule 41(b) of the Federal Rules of Criminal Procedure provides in pertinent part:

> (b) *Grounds for issuance.* A warrant may be issued under this rule to search for and seize any property
>
> (1) Stolen or embezzled in violation of the laws of the United States; or
>
> (2) Designed or intended for use or which is or has been used as the means of committing a criminal offense;
>
> * * *

STATEMENT OF THE CASE

The Government's statement of the case is substantially correct, excepting that the statement contained in footnote 3, at page 6 of its Petition, that certain personal records were intermingled in the boxes containing Petitioner's financial records that were taken from the house, and, after being identified, were returned to the taxpayer, is unsupported by the record or by any evidence in this case.

ARGUMENT

I.

The position of the Government has been that once the validity of a search is established under the Fourth Amendment — and by that fact alone — the Fifth Amendment is not and cannot be violated. Having had the main thrust of this position turned back by the well-reasoned opinion of the Court of Appeals, the Government now concedes that the seizure of evidence of a testimonial or communicative nature may be subject to the privilege against self-incrimination under the Fifth Amendment, as specifically held in *Schmerber v. California,* 384 U.S. 757, and specifically excepted from the holding in *Warden v. Hayden,* 387 U.S. 294. But now, to avoid the obvious, the Petition for Writ of Certiorari seeks to carve out an exception by attempting to make a distinction between books and records which contain evidence of transactions and events, and books and records which contain opinions or beliefs of the possessor, such as diaries, personal letters, and the like.

The statement quoted by the Government in its Petition, from *Stanford v. Texas,* 379 U.S. at 485 n. 16 (Gov. Pet. p. 12), as being in a related context, is inaccurate. A book which is no more than a *ledger of an unlawful enterprise* might well stand on a different constitutional footing than other books and records of a taxpayer, but such statement can have no application to the facts here, for the records of the Respondent were not those of an *unlawful enterprise,* as said in *Stanford.* His keeping of the records in the manner that he did, which the Government contends was for the purpose of violating the Internal Revenue laws, did not make the practice of his profession as a

physician unlawful, nor was it shown that Respondent was in any way engaged in *any* unlawful business activity, which also sets apart the case of *Marron v. United States,* 275 U.S. 192.

The Court's attention is directed to footnote 3, at page 6, of the Government's Petition. As said in the Statement of the Case herein, the comment contained in said footnote is nowhere supported by the record or by any evidence in this case. The obvious purpose of this comment is to tailor the facts to avoid any inconsistency with the theory that the Government now advances.

Although this statement, that: "While some personal records were intermingled in the boxes containing Petitioner's financial records that were taken from his house, the personal material was properly identified and returned without copying . . .," is unsupported by the record and the evidence in the case, it does serve as the demise of the Government's argument that once the validity of a search is established under the Fourth Amendment, the Fifth Amendment cannot be violated because the Magistrate is interposed between the police and the privacy of the home. If the police can pick up records as promiscuously as the IRS agents did here (35 cartons, described by the agents as "truckload of books, records and paper") (Petitioner's Ap. 4a), and then screen out what is personal, to be returned to the owner, what then happens to the function or safeguard of the Magistrate?

Obviously there was no Magistrate to perform such screening operation, or distinguish between the personal records which the Government says were intermingled, and the financial records. And, clearly, the distinction cannot be left to the discretion of the officers *(Stanford v. Texas,* 379 U.S. 476; *Marron v. U.S.,* 275 U.S. 192).

Not only is the question of *who* is to make the distinction left unanswered, but the equally difficult question of *how* to make a distinction between a personal record and a business record is posed. A business record can be in words, or in figures; a personal record can be in the same context. A man's personal records can be his business records, and vice versa.

Nowhere can the Government find authority that the privilege against self-incrimination is limited to testifying or communicating solely as to opinions or beliefs of a man's mind. A record of past events is a testimonial of it and is no less communicative because it is in figures, rather than words. As the Court said in *Schmerber v. California,* 384 U.S. 757, at page 763, "It is clear that the protection of the privilege (Fifth Amendment) reaches an accused's communications, *whatever form they might take.*" (Italics ours)

Moreover, the Government concedes that a taxpayer's business records are the subject of privilege under the Fifth Amendment in the case of an Internal Revenue Service Subpoena for those records *(Stuart v. U.S.,* 416 F.2d 459). It now takes the position that these same records are distinguishable and not subject to the privilege where a search warrant issues for their production.

Warden v. Hayden, 387 U.S. 294, may have repudiated the "mere evidence" rule relied on in *Gouled v. U.S.,* 255 U.S. 298, but it did not disturb the basic holding of *Boyd v. U.S.,* 116 U.S. 616.

II.

The position of the Government that a search and seizure involves no disclosure, production or compulsion, as distinguished from a Subpoena or other process, while perhaps finding support in *Wigmore,* does not find support

in the cases decided by this Court. At the root of Professor Wigmore's reasoning can be found his purpose to give effect to the Fifth Amendment only as a rule of evidence; whereas, our founding fathers never intended it to be so limited, and this Court has construed it as a rule of substantive law in the many related opinions in which it has interpreted the principle in the 85 years since *Boyd vs. U.S.*, 116 U.S. 616.

III.

The further contention of the Government that the records in question are an "instrumentality" for effecting the crime of tax evasion, and not just "mere evidence," has an obvious and simple answer. Nowhere in the record does it appear that the books and records of the taxpayer were false or contained false entries, and the affidavit of the Government's agent establishes that the taxpayer did file income tax returns for the years in question. Therefore, if the crime of unlawful tax evasion was committed, the instrumentality, and the *sole* instrumentality, would have been the fraudulent, or false, income tax return. The books and records were kept as a part of the legitimate business of a practicing physician and were no more the instrumentalities of a crime than his surgical instruments.

Moreover, the *instrumentalities* of a crime were always considered the legitimate objects of a search warrant prior to *Warden v. Hayden,* and the adoption of Rule 41(b) of the Federal Rules of Criminal Procedure. Yet, we have no case or precedent holding that the books and records of a taxpayer are the instrumentalities of the crime of tax evasion.

CONCLUSION

The far-reaching consequences of upholding the Government's position should be considered. As said in the landmark case of *Entick v. Carrington,* 19 Howell St. Tr. 1029, "The power . . . is an execution upon all of the party's papers, in the first instance." Disclosure of the files and papers of a business or professional man should not be subjected to the whim of a disgruntled employee or the anxiety of an Internal Revenue Service agent to obtain information. If a society is to endure, its members must have basic and inalienable rights, among which are those afforded by the Fifth Amendment.

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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